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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2018

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A N A C T

RELATING TO BUSINESSES AND PROFESSIONS - CONTRACTORS' REGISTRATION
AND LICENSING BOARD

Introduced By: Representatives Costantino, Edwards, Cunha, and Marshall

Date Introduced: February 28, 2018

Referred To: House Corporations

It is enacted by the General Assembly as follows:

1 SECTION 1. Section 5-65-1 of the General Laws in Chapter 5-65 entitled "Contractors'
2 Registration and Licensing Board" is hereby amended to read as follows:

3 **5-65-1. Definitions.**

4 As used in this chapter:

5 (1) "Board" means the contractors' registration and licensing board established pursuant
6 to the provisions of Rhode Island general laws § 5-65-14 or its designees.

7 (2) "Claim" means an allegation that a person seeking payment of retainage breached the
8 person's contract for construction for the project; provided, however, that a "claim" related to a
9 project with a contract value of not less than two hundred fifty thousand dollars (\$250,000) shall
10 be subject to the applicable dispute resolution procedure, notice and other requirements in the
11 contract for construction.

12 ~~(3)~~(3) "Commission" means the building code commission supportive of the contractors'
13 registration and licensing board.

14 ~~(4)~~(4) (i) "Contractor" means a person who, in the pursuit of an independent business,
15 undertakes or offers to undertake or submits a bid, or for compensation and with or without the
16 intent to sell the structure arranges to construct, alter, repair, improve, move over public
17 highways, roads or streets or demolish a structure or to perform any work in connection with the
18 construction, alteration, repair, improvement, moving over public highways, roads or streets or

1 demolition of a structure, and the appurtenances thereto. For the purposes of this chapter,
2 "appurtenances" includes the installation, alteration or repair of wells connected to a structure
3 consistent with chapter 46-13.2. "Contractor" includes, but is not limited to, any person who
4 purchases or owns property and constructs or for compensation arranges for the construction of
5 one or more structures.

6 (ii) A certificate of registration is necessary for each "business entity" regardless of the
7 fact that each entity may be owned by the same individual.

8 (5) "Contract for construction" means a contract for which a lien may be established
9 under chapter 28 of title 34 or for state or municipal public works projects as defined in title 37 of
10 the general laws on a project for which the person on whose contract with the project owner has
11 an original contract price of not less than two hundred fifty thousand dollars (\$250,000);
12 provided, however, that "contract for construction" shall not include a project containing or
13 designed to contain at least one, but not more than four (4) dwelling units.

14 (6) "Deliverable" means a project close-out document that shall be submitted by the
15 person seeking payment of retainage under the person's contract for construction; provided,
16 however, that a lien waiver or release, which is a deliverable, shall comply with chapter 28 of title
17 34; provided, further, that "deliverable" shall not include any document affirming, certifying or
18 confirming completion or correction of labor, materials or other items furnished or incomplete or
19 defective work.

20 ~~(4)~~(7) "Dwelling unit" means a single unit providing complete independent living
21 facilities for one or more persons, including permanent provisions for living, sleeping, eating,
22 cooking, and sanitation.

23 ~~(5)~~(8) "Hearing officer" means a person designated by the executive director, to hear
24 contested claims or cases, contested enforcement proceedings, and contested administrative fines,
25 in accordance with the ~~Administrative Procedures Act~~ "administrative procedures act", chapter 35
26 of title 42.

27 (9) "Incomplete or defective work" means labor, materials or any other item required for
28 full performance by a person seeking payment of retainage which remains to be furnished by the
29 person under the person's contract for construction or which has been furnished by the person but
30 requires correction, repair, further completion, revision or replacement; provided, however, that
31 "incomplete or defective work" shall not include deliverables or labor, materials or any other item
32 to be repaired or replaced after substantial or final completion pursuant to a warranty, guarantee
33 or other contractual obligation to correct defective work after substantial or final completion.

34 ~~(6)~~(10) "Monetary damages" means the dollar amount required in excess of the contract

1 amount necessary to provide the claimant with what was agreed to be provided under the terms of
2 the contract reduced by any amount due and unpaid to the respondent inclusive of any and all
3 awards and restitution.

4 (11) "Person" means any natural person, joint venture, partnership, corporation or other
5 business or legal entity who enters into a contract for construction.

6 (12) "Prime contractor" means a person who enters into a contract for construction with
7 the project owner.

8 (13) "Retainage" means a portion or percentage of a payment due pursuant to a contract
9 for construction that is withheld to ensure full performance of the contract for construction.

10 ~~(14)~~ "Staff" means the executive director for the contractors' registration and licensing
11 board, and any other staff necessary to carry out the powers, functions and duties of the board
12 including inspectors, hearing officers and other supportive staff.

13 ~~(15)~~ "State" means the state of Rhode Island.

14 ~~(16)~~ "Structure" means (i) any commercial building; or (ii) any building containing
15 one or more residences and their appurtenances. The board's dispute resolution process shall
16 apply only to residential structures containing dwelling units as defined in the state building code
17 or residential portions of other types of buildings without regard to how many units any structure
18 may contain. The board retains jurisdiction and may conduct hearings regarding violations
19 against all contractors required to be registered or licensed by the board.

20 ~~(17)~~ "Substantially" means any violation, which affects the health, safety, and
21 welfare of the general public.

22 (18) "Substantial completion" means the stage in the progress of the project when the
23 work required by the contract for construction with the project owner is sufficiently complete in
24 accordance with the contract for construction so that the project owner may occupy or utilize the
25 work for its intended use; provided, further, that "substantial completion" may apply to the entire
26 project or a phase of the entire project if the contract for construction with the project owner
27 expressly permits substantial completion to apply to defined phases of the project.

28 SECTION 2. Section 37-12-10 of the General Laws in Chapter 37-12 entitled
29 "Contractors' Bonds" is hereby amended to read as follows:

30 **37-12-10. Retainers relating to contracts for public works, sewer, or water main**
31 **construction.**

32 (a) Upon substantial completion of the work required by a contract aggregating in amount
33 less than five hundred thousand dollars (\$500,000) ~~with any municipality, or any agency or~~
34 ~~political subdivision thereof,~~ for the construction, reconstruction, alteration, remodeling, repair, or

1 improvement of sewers and water mains, or any public works project defined in § 37-13-1, the
2 awarding authority may deduct from its payment a retention to secure satisfactory performance of
3 the contractual work not exceeding five percent (5%) of the contract price. ~~unless otherwise~~
4 ~~agreed to by the parties. Upon substantial completion of the work required by a contract~~
5 ~~aggregating in an amount of five hundred thousand dollars (\$500,000) or greater with any~~
6 ~~municipality, or any agency or political subdivision thereof, for the construction, reconstruction,~~
7 ~~alteration, remodeling, repair, or improvement of sewers and water mains, or any public works~~
8 ~~project defined in § 37-13-1, the awarding authority may deduct from its payment a retention to~~
9 ~~secure satisfactory performance of the contractual work not exceeding five percent (5%) of the~~
10 ~~contract price. In the case of periodic payments with respect to contracts less than the aggregate~~
11 ~~amount of five hundred thousand dollars (\$500,000), the awarding authority may deduct from its~~
12 ~~payment a retention to secure satisfactory performance of the contractual work not exceeding five~~
13 ~~percent (5%) of the approved amount of any periodic payment unless otherwise agreed to by the~~
14 ~~parties. In the case of periodic payments with respect to contracts in the aggregate amount of five~~
15 ~~hundred thousand dollars (\$500,000) or greater, the awarding authority may deduct from its~~
16 ~~payment a retention to secure satisfactory performance of the contractual work not exceeding five~~
17 ~~percent (5%) of the approved amount of any periodic payment.~~

18 (b) ~~The retainage shall be paid to any contractor or subcontractor within ninety (90) days~~
19 ~~of the date the work is accepted by the awarding authority unless a dispute exists with respect to~~
20 ~~the work. If payment is not made within ninety (90) days for any reason other than a dispute,~~
21 ~~which, if resolved and it is not the fault of the contractor, interest shall be assessed at the rate of~~
22 ~~ten percent (10%) per annum on all money which is to be paid to the contractor or subcontractor.~~

23 (c) ~~The retainage shall be paid to any contractor or subcontractor within ninety (90) days~~
24 ~~of the date his or her work is completed and accepted by the awarding authority. If payment is not~~
25 ~~made, interest shall be assessed at the rate of ten percent (10%) per annum.~~

26 (d)(b) There shall also be deducted and retained from the contract price an additional sum
27 sufficient to pay the estimated cost of municipal police traffic control on any public works
28 project. Municipalities shall directly pay the officers working traffic details and shall bill and be
29 reimbursed by the withholding authority for which the contract is being performed every thirty
30 (30) days until the project is complete.

31 (e)(c) Notwithstanding the foregoing, with respect to projects located within the town of
32 Warren, the withholding authority shall hold an amount from the contract price which shall be
33 reasonably sufficient to pay the estimated cost of municipal police traffic control. The
34 withholding authority shall pay to the town of Warren within seventy-two (72) hours of written

1 demand the actual costs of police traffic control associated with said project on an ongoing basis.

2 SECTION 3. Chapter 37-12 of the General Laws entitled "Contractors Bonds and" is
3 hereby amended by adding thereto the following section:

4 **37-12-10.1 Contractor/subcontractor retainage.**

5 (a) No contract for construction as defined in § 5-65-1 or for state or municipal public
6 works projects as defined in title 37 of the general laws, excluding contracts under § 37-12-10,
7 shall include retainage that exceeds five percent (5%) of any progress payment.

8 (b) Not later than fourteen (14) days after reaching substantial completion as defined in §
9 5-65-1, the prime contractor shall submit to the project owner a notice of substantial completion,
10 substantially in the form provided in this subsection, stating the date on which the project was
11 substantially complete.

12 FORM FOR NOTICE OF SUBSTANTIAL
13 COMPLETION NOTICE OF SUBSTANTIAL COMPLETION

14 For [project name]

15 To [project owner]:

16 The undersigned hereby gives notice that the project was substantially complete, as
17 defined under § 5-65-1(18) or for state or municipal public works projects as defined in title 37 of
18 the general laws on [date of substantial completion]. This notice is certified as made in good faith
19 on [date of notice].

20 By _____

21 [prime contractor]

22 Accepted:

23 By _____

24 [project owner]

25 Dated: _____

26 (c) The project owner shall accept or reject the notice of substantial completion within
27 fourteen (14) days of receipt of the notice. The project owner shall indicate its acceptance by
28 signing the notice in the space provided, and shall deliver the notice to the prime contractor
29 within the same fourteen (14) day period. If the project owner fails to deliver the notice to the
30 prime contractor within the fourteen (14) day period, the notice shall be deemed accepted. If the
31 project owner rejects the notice of substantial completion, the project owner shall, within fourteen
32 (14) days of receipt of the notice described in subsection (b) of this section, notify the prime
33 contractor in writing of the rejection, and include in the rejection the factual and contractual basis
34 for the rejection, and a certification that the rejection is made in good faith. A rejection of the

1 notice shall be subject to the dispute resolution provisions of the contract for construction, which,
2 notwithstanding any provision in the contract to the contrary, shall be commenced by the prime
3 contractor within seven (7) days of receipt of the rejection of the project owner. The prime
4 contractor and project owner shall prosecute the dispute resolution procedures diligently,
5 expeditiously, and in good faith. A notice of substantial completion not rejected by the project
6 owner within fourteen (14) days of receipt of the notice and in accordance with this subsection
7 shall be deemed accepted by the project owner. Upon an express or deemed acceptance of a
8 notice of substantial completion, the date of substantial completion shall be the date stated in the
9 prime contractor's notice for all purposes, and the acceptance shall be final and binding on the
10 project owner and its successors and assignees.

11 (d) Not later than fourteen (14) days after the express or deemed acceptance of the notice
12 of substantial completion or, in the case of a dispute, final and binding resolution of the dispute,
13 the project owner shall submit to the prime contractor a written list describing all incomplete or
14 defective work items and deliverables required of the prime contractor under the prime
15 contractor's contract for construction. The list shall be certified by the project owner as made in
16 good faith. Not later than twenty-one (21) days after the express or deemed acceptance of the
17 notice of substantial completion, or, in the case of a dispute, final and binding resolution of the
18 dispute, the prime contractor shall submit to each person from whom the prime contractor is
19 withholding retainage, a written list describing all incomplete or defective work items and
20 deliverables required by the person under the person's contract for construction, which list may
21 include items beyond those on the project owner's list. The list shall be certified by the prime
22 contractor as made in good faith.

23 (e) The project owner and prime contractor shall fulfill their obligations pursuant to
24 subsections (b), (c) and (d) of this section in good faith and in a timely manner. Except where the
25 contract for construction shall provide for an earlier submission, following the expiration of sixty
26 (60) days after substantial completion or, in the case of a dispute under subsection (c) of this
27 section, final and binding resolution of the dispute, a person may submit a written application for
28 payment of retainage in the form required by the person's contract for construction. An
29 application for payment of retainage shall be accompanied by a written list identifying the
30 incomplete or defective work items and deliverables on its received list that the person has
31 completed, repaired and delivered. The list shall be certified by the person submitting the
32 application for payment of retainage as made in good faith. Subject to subsection (f) of this
33 section, an application for payment of retainage shall be paid not later than thirty (30) days
34 following submission of the application or on the next payment cycle in accordance with the

1 established state revolving fund (SRF) payment schedule; provided, however, that the time period
2 for payment of an application for retainage by the person at each tier of contract below the owner
3 of the project may be extended by seven (7) days longer than the time period applicable to the
4 person at the tier of contract above the person.

5 (f) Not more than the following amounts may be withheld from the payment of retainage:

6 (1) For unknown or foreseeable defects that may become known in the first year after
7 substantial completion, one-half percent (1/2%) may be held for up to one year following the date
8 of substantial completion;

9 (2) For incomplete, incorrect or missing deliverables, either the value of the deliverables
10 as mutually agreed upon in writing by the parties to the contract for construction of the person
11 seeking payment of retainage pursuant to the contractor if no value has been agreed upon in
12 writing by the parties, the reasonable value of the deliverables which shall not exceed two and
13 one-half percent (2.5%) of the total adjusted contract price of the person seeking payment of
14 retainage;

15 (3) One hundred fifty percent (150%) of the reasonable cost to complete or correct
16 incomplete or defective work items; and

17 (4) The reasonable value of claims and any costs, expenses and attorneys' fees incurred as
18 a result of the claims if permitted in the contract for construction of the person seeking the
19 payment of retainage. No amount shall be withheld from the payment of retainage unless the
20 person seeking payment has received, before the date that the payment is due, a description, in
21 writing, of the incomplete or defective work items and incomplete, incorrect or missing
22 deliverables, the factual and contractual basis for the claims and the value attributable to each
23 incomplete or defective work item, deliverable and claim. The writing shall be certified as made
24 in good faith. A person may submit additional applications for payment of retainage in the form
25 required by the person's contract for construction following completion or correction of
26 incomplete or defective work items, the furnishing of deliverables or the resolution of claims. The
27 additional applications shall be paid, and amounts may be withheld from payment, in accordance
28 with subsection (f) and this subsection.

29 (g) Retainage held by the project owner on account of the prime contractor's self-
30 performed labor, materials and equipment shall be eligible for payment to the same extent as if
31 the labor, materials and equipment had been provided by a person under a contract for
32 construction with the prime contractor.

33 (h) If the prime contractor has not been declared in default under the requirements of the
34 contract for construction with the project owner and subject to this section, the project owner

1 shall not withhold any part of the retainage of a person under a contract for construction with the
2 prime contractor or the prime contractor's proportional retainage calculated thereon for a claim
3 that the project owner asserts against the prime contractor that is not based on the performance of
4 the person or a default of the person's contract for construction.

5 (i) A contract for construction may establish the date of the month for submission of an
6 application for payment of retainage; provided, however, that the contract may not restrict the
7 submission to less frequently than one application per calendar month. An application submitted
8 prior to the date established in the contract for construction shall be deemed submitted as of the
9 date established in the contract. A rejection of an application for payment of retainage and a
10 dispute regarding incomplete or defective work items, deliverables or claims shall be subject to
11 the applicable dispute resolution procedure. A provision in a contract for construction that
12 requires a person to delay commencement of the applicable dispute resolution procedure for more
13 than thirty (30) days after either the rejection of an application for payment of retainage or written
14 notice of the dispute is provided, whichever first occurs, shall be void and unenforceable. The
15 payment of retainage shall be subject to subsection (e) of this section.

16 (j) A communication required by this section to be in writing may be submitted in
17 electronic form and by electronic means.

18 (k) A provision in a contract for construction which purports to waive, limit or subvert
19 this section or redefine or expand the conditions for achievement of substantial completion for
20 payment of retainage shall be void and unenforceable.

21 (l) Any contract under this section, as defined by § 37-13-1, that exceeds twelve (12)
22 months in duration shall allow those subcontractors who are substantially complete within the
23 first third (1/3) of the project to request from the prime contractor, release of retainage pursuant to
24 subsections (b), (c), (d) and (e) of this section.

25 (m) The Rhode Island department of transportation (RIDOT) shall be exempt from the
26 provisions of this section and may deduct from any payments required pursuant to any
27 construction contract, an amount reasonably sufficient to secure satisfactory performance of
28 contractual work which amount shall not exceed five percent (5%) of the contract price.

29 SECTION 4. Notwithstanding any general or special law to the contrary, this act shall not
30 apply to a contract for construction relating to a project for which the owner's contract was
31 entered into prior to the effective date of this act.

32 SECTION 5. This act shall take effect upon passage.

EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

A N A C T

RELATING TO BUSINESSES AND PROFESSIONS - CONTRACTORS' REGISTRATION
AND LICENSING BOARD

- 1 This act would provide procedures relative to contractor/subcontractor retainage.
- 2 This act would take effect upon passage.

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